Supreme Court, U.S.
JUN 1 2000
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No. 99-1552

In The

Supreme Court of the United States

STATE OF LOUISIANA, THROUGH THE HONORABLE MIKE J. FOSTER, JR. GOVERNOR; THE LOUISIANA STATE BOARD OF ETHICS, AND ITS MEMBERS; ROBERT ROLAND, HARRY BLUMEHTHAL, JR., ROBERT BARTEIKIS, Dr. E.L. GUIDRY, VIRGIL ORR, Dr. REVIUS ORTIQUE, JR., T.O. PERRY, JR., ROBERT L SAWYER, NATHAN J. THORNTON, JR., EDWIN O. WARE III, CAROLE COTTON WINN; DAVID W. HOOD, SECRETARY OF THE LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS; AND MARK C. DRENNEN, COMMISSIONER OF ADMINISTRATION,

Petitioners,

versus

PHILLIP E. O'NEILL, AVERY C. ALEXANDER, AND ARTHUR A. MORRELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeal For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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WHERE'S THE SPECIAL NEED?

SUMMARY OF ARGUMENT

Searches and seizures

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. Amend IV. (Applicable to the States through the Fourteenth Amendment – *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623 (1996) at page 1628.

> "Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment. (FN4)." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 at 617, 109 S.Ct. 1402 (1989) at 1413.

Louisiana's scheme for the random testing of all of its elected officials' urine, for illegal drugs, as set out in LSA-R.S. 42:1116.1 (La. Act 1303 of 1997)[1] and Chapter 17 of the Rules for the Louisiana Board of Ethics involving the drug testing of elected officials[2] is void of any meaningful distinction from the premises and facts set out in *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d

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[1] See Petitioners' Appendix, Pages 250-253.

[2] See Petitioners' Appendix, Pages 39-53.

513 (1997) and is outside the parameters of *National Treasury Employee Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384 (1989), *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), or *Veronia School Dist. 473 v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) and is within the parameters of *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295 (1997) and therefore such scheme violates the Fourth Amendment of the Constitution of the United States of America, applicable to the States through the Fourteenth Amendment, by allowing a prohibited seizure and search, under the Fourth Amendment; therefore, said statute is unconstitutional on its face and is unenforceable against any elected official in the State of Louisiana.

> "Our precedents establish that the proffered special need for drug testing must be substantial – important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion. . . . Georgia has failed to show, in justification of § 21-2-140, a special need of that kind." *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295 (1997) at 1303.

ARGUMENT

Like Georgia, in *Chandler v. Miller, supra*, Louisiana fails to show any such need that would justify the drug testing scheme created by LSA-R.S. 42:1116.1 wherein it specifically sets out "that all elected officials demonstrate that they do not use illegal drugs, without the necessity

of showing any measure of individualized suspicion."[3] Petitioners' brief admits as much, " . . . there has been no showing of a history of drug abuse by Louisiana's elected officials,. . . . "[4]

Petitioners, at all times, have ignored the first prong of *Chandler, supra,* namely "the lack of need"; talking only about the convenient invasions of privacy with its methods of seizing and searching the urine, as if this so-called "convenience" excuses the violation of the Fourth Amendment. No intrusion of Fourth Amendment protections is "convenient", some are simply less intrusive than others:

> "But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged." *Chandler v. Miller,* 520 U.S. 305, 117 S.Ct. 1295 (1997) at 1305.

There is nothing, absolutely nothing, that an elected official can do or accomplish, as an elected official, to reach a point of no return, relating to public endangerment or safety, that the normal law enforcement of the injunctive process of the civil law cannot prevent; *as was done in this case.* Normal police surveillance, tactics and enforcement of the criminal laws of the States and Nation can handle any crime committed by an elected official,

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[3] See Petitioners' Appendix, pages 250-251: LSA-R.S. 42:1116.1A reads in part " . . . demonstrate that they do not use illegal drugs, without the necessity of showing any measure of individualized suspicion".

[4] See page 11, petitioner's brief.

even in his official capacity, without sacrificing the protections of the Fourth Amendment.

Finding as a matter of fact that the State of Louisiana acknowledges that no history of drug abuse exists among its elected officials and that other considerations in conjunction with this one are fatal to section 1116.1, Honorable Eldon E. Fallon, U.S. District Judge, with a complete understanding of the premises, predicates and mandates cited in *Chandler v. Miller, supra,* concluded that LSA-R.S. 42:1116.1 must be declared in violation of the Fourth Amendment and therefore unconstitutional, to-wit:

> "The defendants place great emphasis on the distinction between elected officials and candidates in their attempt to distinguish this dispute from *Chandler*. The tone of the majority opinion in that case, however, indicates that the *Chandler* Court saw little difference between the two groups. The majority explicitly referred to elected officials rather than candidates when it found that the statute's target group performed no safety sensitive tasks establishing the requisite special needs. Moreover, it is clear from the *Chandler* opinion that the only reason Georgia was interested in testing candidates was due to the prospect that they might later become elected officials. Absent this possibility, there was absolutely no reason to pass such a statute in the first instance. Furthermore, if it is improper to drug test a candidate for elected office, it seems incongruous to hold that once an individual is actually in office that person is somehow more susceptible to the very same search.

> Because this Court finds no meaningful distinction between candidates for public office and those who have ascended to such office following an election, the principles of Chandler squarely control the outcome of this case." *O'Neill, et al v. State of Louisiana, et al*, 61 F.Supp. 2nd 485 (USDC E.D. LA, 11/24/98, the Honorable Eldon E. Fallon, U.S. District Judge, Presiding) at page 496.

In spite of Justice Ginsburg's notice of and rejection of Georgia's defense of their statute, to-wit:

> "Respondents' defense of the statute rests primarily on the incompatibility of unlawful drug use with holding high state office. The statute is justified, respondents contend, because the use of illegal drugs draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials. Brief for Respondents 11-18. The statute, according to respondents, serves to deter unlawful drug users from becoming candidates and thus stops them from attaining high state office. Id., at 17-18. *Notably lacking in respondents' presentation is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule." Chandler v. Miller, supra,* at 117 S.Ct. 1303.

Louisiana insists on using the same defense of LSA-R.S. 42:1116.1 that failed in *Chandler, supra.* This defense has no merit, whatsoever.

The Fourth Amendment is not a symbol and no symbolic rhetoric creating a symbolic need can destroy the protections of the Fourth Amendment:

"The need revealed, in short, is symbolic, not 'special,' as that term draws meaning from our case law." *Chandler v. Miller, supra,* 117 S.Ct. at 1305.

AND

"However well-meant, the candidate drug test Georgia has devised diminishes personal privacy for a symbol's sake. The Fourth Amendment shields society against that state action." *Chandler v. Miller, supra,* 117 S.Ct. at 1307.

AS WELL AS

"Indeed, if a need of the "set a good example" genre were sufficient to overwhelm a Fourth Amendment objection, then the care this Court took to explain why the needs in Skinner, Von Raab, and Vernonia ranked as "special" wasted many words in entirely unnecessary, perhaps even misleading, elaborations." *Chandler v. Miller, supra,* 117 S.Ct. at 1305.

WRAPPING IT UP & TYING IT DOWN

". . . . We reverse that judgment. Georgia's requirement that elected officials pass a drug test does not fit within the closely guarded category of constitutionally permissible suspicionless searches." *Chandler v. Miller, supra,* 117 S.Ct. at 1298.

Change "Georgia" to "Louisiana" and the foregoing, alone, denies the Petitioners' Application For Writ Of Certiorari.

The Honorable Rosemary Barkett, Circuit Judge, U.S. Court Of Appeals For The Eleventh Circuit, in her dissent in *Chandler v. Miller,* 73 F.3d 1543 (C.A. 11, 1996) at page 1549-50 put everything in perspective, to-wit:

> "As the majority recognizes, there is no question that the mandatory drug testing in this case is an unreasonable search prohibited by the Fourth Amendment *unless* it is required by 'special governmental needs beyond the normal need for law enforcement,' and those needs outweigh the candidates' privacy interests. *National Treasury Employees v. Von Raab*, 489 U.S. 656, 665-66, 109 S.Ct. 1384, 1390-91, 103 L.Ed.2d 685 (1989) (citing *Skinner v. Railway Labor Executives' Assn*, 489 U.S. 602, 109 S.Ct. 1402, 1413-14 (1989)). I dissent because I do not believe that the suspicionless search in these circumstances serves any special governmental need beyond the normal need for law enforcement, and, if it did, I believe that the candidates' privacy interests outweigh the governmental interests when the factors of *Von Raab* are properly considered.
>
> Before balancing the candidates' privacy expectations against the government's interests in conducting suspicionless drug screening, the court must first ascertain whether this case presents a special governmental need beyond the normal need for law enforcement. (FN1) In simpler terms, before the court can balance the competing interests in this case, it must first ask what is so impractical about requiring a warrant or individualized suspicion in the circumstances presented here. It is in this threshold inquiry that I believe the majority first errs."

Thank you, Judge Barkett, for making a fine contribution to the Crown Jewels of our freedoms; the First and Fourth Amendment. The compliment of Justice Ginsburg noticing your dissent in *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295 at 1300 is very well deserved.

Like Georgia, in *Chandler,* Louisiana says that the suspicionless tests signify that elected officials will be free to serve their constituents free from the influence of illegal drugs, but asserts no evidence of a drug problem among said elected officials. In responding to this premise Justice Ginsburg, speaking for the court, declared:

> " . . . those officials typically do not perform high-risk, safety sensitive tasks, and the required certification immediately aids no interdiction effort." *Chandler,* 117 S.Ct. at 1305.

Louisiana says it is joining the drug war;[5] that's not a reason to deprive free people of their Fourth Amendment Protections:

> "To me the argument set up by the other side seems a delusion simply. In a time of war, more than at any other time, Public Liberty is in the hands of the public officers. And she is there in double trust; first, as they are citizens, and therefore bound to defend her, by the common obligation of all citizens; and next, as they are her special guardians. The opposing argument, when turned into its true sense, means this, and this only: that when the Constitution is attacked upon one side, its official guardians may assail it upon the other; when rebellion strikes it in the face, they may take advantage of the blindness produced by the blow, to stab it in the back." *Ex Parte Milligan,* 71 U.S. 2 (U.S. [hid.]. 1866) – Excerpt from 71 U.S. at page 79. (Attorney J.C. Black argument).

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[5] See Petitioners' Brief, page 11.

And, so it goes in the so-called "Drug War" that our elected leaders have declared. While the people are blinded by all the rhetoric concerning such pseudo war, those same elected leaders sneak up on the Fourth Amendment and stab it in the back.

Fortunately, for Free People, like in *Ex parte Milligan*, supra, our courts guard the Amendments (BILL OF RIGHTS), like the jewels of liberty they are, and prevent such stabbing from becoming fatal.

Any attempt by Louisiana, like Georgia in *Chandler*, to use as support for its position *Vernonia School Dist. 47J v. Acton*, 515 U. S. 646, 115 S.Ct. 2386, 2389, 2396-2397, 132 L.Ed.2d 564 (1995) (random drug testing of students who participate in interscholastic sports); *National Treasury Employee Union v. Von Raab*, 489 U.S., at 659, 109 S. Ct. at 1387 (drug tests for United States Customs Service employees who seek transfer or promotion to certain positions); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S, 602, 608-613, 109 S.Ct. 1402, 1408-1411, 103 L.Ed.2d 639 (1989) (drug, and alcohol tests for railway employees involved in train accidents and for those who violate particular safety rules), is misplaced and not appropriate in the face of *Chandler*.

The United States Court Of Appeals for the Fifth Circuit affirmed the United States District for the Eastern District of Louisiana's decision declaring the Louisiana Scheme of Drug Testing its elected officials unconstitutional, with the following compliment to the Honorable Eldon E. Fallon, District Judge:

"This is an appeal from the decision of the district court holding that Louisiana Revised Statute 42:1116.1, which provides for random drug testing of elected officials holding state office in Louisiana, is violative *1170 of the Fourth Amendment of the United States Constitution. We have reviewed the record on appeal and the appellate briefs of counsel, and have heard arguments of able counsel discussing the relevant facts from the record and the applicable law as related in briefs and those arguments. In the end we are satisfied that the district court committed no reversible error in applying the pertinent law to the virtually uncontested facts and that *all rulings of the district court should be affirmed for essentially the reasons set forth in the complete and well-crafted opinion of that court.* [FN1]" (Emphasis added.)

FN 1. See O'Neill, et al. v. State of Louisiana, et al., 61 F.Supp.2d 485 (USDC E.D. La. 1998). O'Neill v. State of Louisiana, 197 F.3d 1169 (C.A. 5, 1999).[6]

CONCLUSION

No special need exists in this matter.

Louisiana's attempt to distinguish this matter from *Chandler* is like separating the SUN from SUNSHINE, it can not be done.

LSA-R.S. 42:1116 is unconstitutional because under *Chandler* there is no special need to drug test elected

[6] See Petitioners' Appendix, pages 1-3.

officials. As the courts below held in this case, there is no significant distinction between LSA-42:1116 and the statute held unconstitutional in *Chandler.* There is no reason for reversing *Chandler v. Miller,* 520 U.S. 305, 117 S.Ct. 1295 (1997), or the courts below.

The Petitioners' Application For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit should be denied.

Respectfully Submitted,

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